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No. 88-1986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BORDEN, INC.,

Petitioner,

v.

AFFILIATED FM INSURANCE CO.,

Respondent.

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner Borden, Inc. ("Borden") submits this reply brief in further support of its petition for a writ of certiorari to review a judgment of and the denial of a petition for rehearing by the United States Court of Appeals for the Sixth Circuit. In its opposition to the petition, Respondent Affiliated FM Insurance Company ("Affiliated") contends that no federal or constitutional question is raised by the petition here meriting this Court's review. Brief for Respondent at 9. Yet the Sixth Circuit's total abrogation of state court authority in a matter governed by state law requires this Court's review.

This Court has long recognized that the required deference to state decisions on matters of state law is of constitutional import. Indeed, the autonomy of the state courts to determine matters of state law lies at the very heart of our federalist system and is an essential element of state sovereignty. This Court long ago rejected the notion, enunciated in *Swift v. Tyson*, 41 U.S. 1 (1842), that the federal courts were free to abrogate such state sovereignty by imposing their own resolution of state law issues when sitting in diversity.

As noted by Justice Brandeis in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this rejection was based on the *constitutionally* required deference to state law in state matters:

> The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. Other legislative relief has been proposed. If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. *But the unconstitutionality of the course pursued has now been made clear, and compels us to do so.*

304 U.S. at 77-78 (footnotes omitted; emphasis added). Failure to defer to the state courts in such matters

> is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." . . . We . . . declare that in [failing to show such deference] this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

304 U.S. at 79-80.

The federal invasion into state judicial autonomy is no less disruptive of the federalist system when the attack is on unchallenged state intermediate appellate precedent than when it is on a decision of the state's highest court. As Ohio permits no further appeal of the intermediate appellate precedents relied upon by Borden, except by discretionary review, which was rejected, the binding effect of these intermediate appellate decisions is mandatory. *Six Companies of California v. Joint Highway District No. 13*, 311 U.S. 180, 185-88 (1940) (reversing a Ninth Circuit decision on the grounds that it was contrary to unchallenged state appellate precedent); *see also Affiliated FM Insurance Co. v. Trane*, 831 F.2d 153, 155 (7th Cir. 1987) ("a federal court must apply the state law as declared by the highest state court *or otherwise by the intermediate appellate court of the state*. It has limited discretion to adopt untested legal theories brought under the rubric of state law.") (emphasis added).

In ignoring unanimous Ohio state appellate court precedent on the state law issues before it, the district court, upheld by the Sixth Circuit, failed to follow the constitutional dictates of *Erie*. While stating that such precedent was entitled to "some deference," it accorded *none* to the appellate decisions before it — indeed going so far as to omit any mention or citation of the most recent state precedent on these state law issues, *Kipin Industries, Inc. v. American Universal Insurance Co.*, 41 Ohio App.3d 228, 535 N.E.2d 234 (1987), *motion to certify record overruled*, No. 87-1720 (Ohio Sup. Ct. Jan. 13, 1988). While citing the decisions of *other* jurisdictions,[1] the Sixth Circuit failed to point to any evidence that the law of *Ohio* interpreting the pollution exclusion was other than stated in *Kipin*.

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[1] Significantly, while Respondent is willing to have the district court substitute the holdings of other states for Ohio's unchallenged appellate precedent on the pollution exclusion, it also would have the federal court *ignore* an overwhelming body of precedent from other states on the one issue *not* addressed by the Ohio Courts — the premises alienated exclusion, and the essentially identical own property exclusion. Respondent's Brief at 8.

This federal intrusion is particularly troubling in that the Ohio Supreme Court *specifically refused* to review the *Kipin* decision. Indeed, the Ohio Supreme Court's refusal to review *Kipin* provides overwhelming evidence that that decision correctly states the law of Ohio. The federal court was not free to substitute its own judgment of the law for that of the state appellate courts which the state's highest court has refused to disapprove.

Even were the federal court not bound by these unchallenged state precedents, a proper respect for the sovereignty of the state and the authority of its courts dictated that rather than impose its own view of state law, the federal court should have certified these questions to the Ohio Supreme Court. Indeed, another panel of the Sixth Circuit has recognized certification to be the proper procedure in such instances. *International Surplus Lines Insurance Co. v. Anderson Development Co.* (No. 87-2102). The recent case of *Claussen v. Aetna Casualty & Surety*, 865 F.2d 1217 (11th Cir. 1989), demonstrates conclusively that certification is to be preferred over blatant substitution of the federal court's judgment for that of the state.

Claussen involved the very question of state insurance law at issue here: is the pollution exclusion ambiguous? As here, the federal district court in *Claussen*, sitting in diversity, held that it was not. Unlike the Sixth Circuit, the Court of Appeals for the Eleventh Circuit certified the question of the proper interpretation of the clause to the Georgia Supreme Court. That court, like Ohio's intermediate appellate courts, held as a matter of state law that the clause was ambiguous. Because the Eleventh Circuit certified the issues in *Claussen*, the state's highest court was able to exercise its constitutional authority over state law. By rejecting state precedent and failing to refer to the Ohio Supreme Court the issues of state law presented herein, the Sixth Circuit has denied Ohio's courts their sovereign authority to decide state law issues.

It is no answer to note, as Respondent does, that in Ohio the certification rules do not *require* the federal courts to certify

such questions. This Court has not hesitated to review the discretionary exercise of jurisdiction by the federal courts in order to maintain the proper deference to state judicial authority. *See, e.g. Younger v. Harris*, 401 U.S. 37, 44 (1971) (requiring federal courts to abstain where necessary to insure that "the States and their institutions are left free to perform their separate functions in their separate ways"). Similarly, review by this Court is required here to reaffirm the *Erie* commitment to the sovereignty of state judicial authority.

CONCLUSION

For the reasons set forth herein, and in the prior petition, petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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